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IN THE

Supreme Court of the United States

No. 75-501

October Term, 1975

JAMES BROWN a/k/a JAMES FEDERICO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD E. WALLACH
Attorney for Petitioner
11 Park Place
New York, N.Y.10007
(212) 227-0959

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5388

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975

No.

JAMES BROWN a/k/a JAMES FEDERICO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, JAMES BROWN, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of appeals for the Second Circuit entered on or about September 2, 1975 affirming a judgment of the United States District Court for the Southern District of New York entered on or about April 18, 1975 convicting petitioner, upon his plea of guilty,* of conspiracy to pass, deal in, and possess counterfeit United States obligations in violation of Title 18 U.S.C. Section 371 and sentencing petitioner to a three (3) year term of imprisonment and a $25,000 committed fine.

* A plea was entered by a co-defendant, James Phillips, reserving the right to raise on appeal the questions raised herein. Petitioner, a co-defendant in the District Court joined in Phillips' motion to dismiss the indictment in the District Court.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed, no opinion. An opinion was written by Hon. Milton Pollack, in the District Court, reproduced herein Appendix A.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit is dated September 2, 1975. A copy of said order is reprinted herein as Appendix A.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the special attorney for the Strike Force was authorized to appear before the United States Grand Jury for the Southern District of New York to present this case?

STATEMENT OF THE CASE

After a trial which ended in a deadlocked jury, petitioner pleaded guilty to count 1 of the indictment.

Prior to trial, a motion to dismiss the indictment on the ground that special attorney Edward J. Levitt of the Strike Force who presented this case to the grand jury was without authority to do so was made by petitioner's co-defendant in the District Court, James Phillips. Petitioner joined in the application. Disagreeing with Judge Werkers decision in *U.S. v. Crispino*, 392 F. Supp. 764 (S.D.N.Y.) rev'd. 417 F. 2d 1395 (2nd Circuit), Judge Pollack denied the motion in an opinion reproduced herein as Appendix A.

REASON FOR GRANTING THE WRIT

Congress specifically limited the authority of special attorneys appointed by the Attorney General or an officer of the Department of Justice:

> "When specifically directed by the Attorney General to conduct any kind of legal proceeding . . . including grand jury proceedings . . . " Title 28, U.S.C. 515(a).

A letter from Henry A. Petersen, Assistant Attorney General, appointed Mr. Levitt to assist in the trial of "violations of federal criminal statutes" in the Southern District and other districts and authorized Mr. Levitt among other duties to bring "grand jury proceedings".

Certain district court decisions have supported a limited strike force authority in strict conformity to the wording of Section 515(a). *U.S. v. Agruso*, No. 74 CR 269 W 1 (W.D.Mo. 2/25/75); *U.S. v. Crispino, supra; U.S. v. Wrigley*, 74 CR 448 W-1 (W.D.Mo. 2/5/75); *U.S. v. Williams*, No. 74 CR 47 W-1 (W.D.Mo. 11/15/74). Other district court judges including judges of the same district court as cited in those cases above requiring a strict interpretation, have allowed a more permissive strike force authority. *U.S. v. DiGirlomo*, 74 CR 456, W-4 (W.D.Mo. 3/26/75); *U.S. v. Lyberger*, 74 CR 25 (N.D. Ill. 3/24/75); *U.S. v. Weiner*, 74 CR 336 (N.D. Ill. 3/17/75); *U.S. v. Jacobson*, 75 CR 936 (S.D.N.Y. 3/3/75); *In Re Langella*, 74 CR 638 (E.D.N.Y. 2/27/75); *Sandello v. Curran*, 11 188 (S.D.N.Y. 2/27/75); *U.S. v. Albanese*, 74 CR 814 (E.D.N.Y. 2/14/75); *U.S. v. Ferri*, 74-277 Crim. (W.D. Pa. 2/18/75); *U.S. v. Bradson*, 74 CR 98 (E.D. Wis. 2/31/75).

Recently those decisions advocating a limited authority have been overruled by their respective circuits. See *In Re Grand Jury Subpoena of Alphonse Persico* — F.2d — 2nd Cir. Dec. 6/19/75 Slip Opinion; *U.S. v. Wrigley* — F. 2d — 2nd Cir. Dec. 7/18/75, 17 CR L 2360.

A most expansive interpretation of Section 515(a) was taken

by the 8th Circuit in *U.S. v. Wrigley, supra;* finding the "assertion that 515(a) contains a limitation . . . unpersuasive" and that 515(a) was without "standards" by which a court can determine whether a "special attorney's appointment is properly limited". The Court however was concerned with the widespread use of special attorneys and their qualifications to appear in the federal court of that circuit.

On the other hand the 2nd Circuit *In Re Grand Jury Subpoena of Alphonse Persico supra* chose a more restrictive interpretation of 515(a):

> "While the reading more favorable to the government is possible, for purposes of this case we prefer to adopt a more restrictive interpretation, namely that an officer or other full-time employee of the Department of Justice must be 'specifically directed' to conduct grand jury proceedings if he is not a United States attorney or an Assistant United States Attorney. We hold that such a specific direction to an attorney regularly employed on a full-time basis by the Department of Justice need not be embodied in a single authorization but may be implied from other writings, guidelines, practices and oral directions transmitted within a chain of command within the department." (4178)

While there may not exist a split in the decisions between the 2nd and 8th Circuits, there certainly is a diversity of interpretation as to whether 515(a) grants a broad license or limits the Attorney's General's appointments to "specifically directed" proceedings. Therefore, at least in the 2nd Circuit the logic of Judge Werker's decision in *U.S. v. Crispino,* 392 F. Supp. 764 (S.D.N.Y.) Rev. 417 F. 2d 1395 (2nd Cir.) remains undisturbed.

> "The commission letter . . . is a bold assertion of authority by the Attorney General to appoint special attorneys in any case regardless of whether any particular skill or knowledge is required. If upheld it would allow these special attorneys to supercede the local

United States Attorneys and their regular assistants, whose statutory duty for the last 186 years has been to prosecute all offenses against the United States in their districts, in any case involving a violation of a 'federal criminal statute'. Congress never intended to give such a broad authority when it passed the act in 1906 even if the statute be for 'the protection of the United States' and no case construing that statute supports such a proposition." (778)

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Petitioner

OPINION AND ORDER OF THE COURT

MILTON POLLACK, District Judge.

This prosecution charges defendants with crimes under the counterfeiting statutes and conspiracy to violate the same. 18 U.S.C. §§472, 473, 474, and 371. The attorney who presented the case to the Grand Jury was Edward J. Levitt, a special attorney with the Organized Crime and Racketeering Section of the Criminal Division, United States Department of Justice (the "Strike Force").

Defendants James Philips and James Brown joined in a motion pursuant to Fed. R. Crim. P. 12(b)(2) prior to trial to dismiss the indictment against them on the basis of the decision of Judge Werker in *U.S.A. v. Crispino*, 74 Crim. 932 (S.D.N.Y. Feb. 12, 1975). It was there held that the Special Strike Force created with the advent of the Justice Department's assault on organized crime was not authorized to appear before the Grand Jury in that case because the appointed assistant prosecutor was not in terms told that he could appear before the Grand Jury which functioned on the indictment therein.

In this case Mr. Levitt stated for the record that the commission authorizing him to prosecute crime in this District was identical to that considered by Judge Werker in *Crispino*. After denial of his motion to dismiss the indictment, the defendant Philips pleaded guilty reserving his rights to raise on appeal the question raised in *Crispino*.

The relevant statute in question here is 28 U.S.C. §515(a), which reads as follows:

> The Attorney General or any officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct, . . .

It is conceded herein as Judge Werker also found in *Crispino* that the Attorney General was empowered to designate an assistant to extend the authorization to the Strike Force attorney and that Mr. Petersen, Assistant Attorney General, was so designated and in turn commissioned the prosecutor, a member of the Strike Force staff, to undertake any kind of grand jury proceedings in any kind of legal proceedings which United States Attorneys are authorized to conduct.

Here, Prosecutor Levitt was, by his commission letter

> authorized and directed to file informations and to conduct in the [Southern] District [of New York] and any other judicial Districts of the United States any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Clearly, therefore, in express terms Mr. Levitt was specifically authorized and directed to conduct the kind of grand jury proceedings that led to the indictment here. He was authorized for "any kind" of prosecution which a regular United States Attorney could conduct before any Grand Jury. This is not a case where the prosecutor has been authorized and directed to prosecute only one type of case or to proceed only against a particular defendant or to perform only one particular function and where nonetheless he has overstepped such limited and special authority. *Compare, United States v. Hall*, 145 F. 2d 781 (9th Cir. 1944), *cert. denied*, 324 U.S. 871 (1945).

As the legislative history indicates, the Congress in enacting the statute which has now become §515(a) was attempting to expand the authority of the Attorney General to comprehensively and effectively combat crime. The background for the enactment was that in 1903, the Circuit Court for the Southern District of New York had held that neither the Attorney General nor his assistants were authorized by law to appear before grand juries as prosecutors. *United States v. Rosenthal*, 121 F. 862 (C.C. S.D.N.Y. 1903). In direct response to the decision,

Congress passed the statute here in question, making it clear that the Attorney General and those under his direction were empowered to conduct any criminal or civil proceedings which United States Attorneys were authorized to conduct. H. R. Rep. No. 2901, 59th Cong., 1st Sess. (1906).

While much has been made of the congressional intent said to be illustrated by the inclusion of the phrase that the Attorney General's deputy be "*specifically* directed" to conduct legal proceedings, it is clear that in the upper house at least the requirement was not given much consideration. The Senate version of the bill, S. 2969, did not contain the word "specifically" at all. 40 Cong. Record 7013-14 (1906). This version was withdrawn by the Senate when the House passed its version and H.R. 17714 was passed by the Senate. 40 Cong. Record 9662 (1906). The fact that the statement of H.R. 17714 in the Congressional Record description of the Senate proceedings omits the word "specifically" also seems to indicate its relative unimportance in the legislation at least from the Senate's viewpoint. 40 Cong. Record 9662 (1906).

At the time the statute was passed, special prosecutors apparently were appointed from time to time to prosecute specific crimes concerning which they had particular knowledge or competence. Questions inevitably arose as to whether these specially appointed prosecutors had, in bringing particular cases, overstepped the bounds of their limited commissions. *See, e.g., United States v. Powell*, 81 F. Supp. 288 (E.D. Mo. 1948); *United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254 (D. Md. 1931); *United States v. Huston*, 28 F.2d 451 (N.D. Ohio 1928); *United States v. Morse*, 292 F. 273 (S.D.N.Y. 1922). There is no question here, however, that the prosecutor was authorized to conduct the instant proceedings, as the Attorney General, through his deputy Mr. Petersen, legally conferred upon Mr. Levitt the broad power to conduct "any kind of proceeding" before any grand jury that the United States Attorney can conduct.

An examination of the history and purposes of the strike

forces reveals the reason why this broad grant of power and direction was considered necessary by the Department of Justice and why it is proper.

While the appointment of single special prosecutors, each commissioned *ad hoc* to focus on specific instances on crime, and each having a particular legal competence, may have been appropriate in the early years of this century, by the latter part of the 1960's, conditions had clearly changed. As the President said in a 1968 message to Congress, "It is clear that sporadic, isolated, uncoordinated attacks on the disciplined army of the underworld cannot obtain lasting results." "To Insure the Public Safety—Message from the President of the United States", (H.Doc. 250), 114 Cong. Record 2412 (Feb. 7, 1968).

The concept of "strike forces" of federal officers to deal with organized crime was first developed by Attorney General Ramsey Clark during the presidency of Lyndon Johnson, in response to a general feeling on the part of the Administration and the Congress that the federal government had been ineffective in fighting crime. *See, e.g.*, "Federal Effort Against Organized Crime: Report of Agency Operations", by the Legal and Monetary Affairs Subcommittee of the House Committee of Government Operations (House Rep. No. 1574, 90th Congress, 2d Session) reported in 114 Cong. Record 21014 (July 12, 1968) at 21615 "The Federal Government has not borne its obligation with the constancy and force that its role in the overall battle against organized crime demands."

In a message to Congress not long after taking office, President Nixon informed the Congress that the strike forces already set up would be continued and new units would be initiated. In his speech of April 23, 1969, the President said that the strike forces were necessary:

> [t]o combine in one cohesive unit a cadre of experienced Federal Investigators and prosecutors, to maintain a Federal presence in organized crime problem areas throughout the nation on a continuing basis. . .

> These officers bring together, in cohesive single units, experienced prosecutors from the Justice Department, special agents of the F.B.I., investigators of the Bureau of Narcotics and Dangerous Drugs, the finest staff personnel from the Bureau of Customs, the Securities and Exchange Commission, the Internal Revenue Service, the Post Office, the Secret Service, and other Federal Officers with expertise in diverse areas of organized crime.

The President noted that "[t]o deal with the heavy concentration of criminal elements in the Nation's largest city", the Strike Force in the Southern District of New York would take the form of a special Federal-State Racket Squad, which would emphasize cooperation between federal and local authorities. "Organized Crime Message from the President of the United States" (H. Doc. No. 91-105), 115 Cong. Record 10041, 10042 (Apr. 23, 1969). This unit was actually set up in New York on July 7, 1969 and it is as a member of this unit that Mr. Levitt received his authorization and direction from the Attorney General.

The statutory requirement of a specifically directed authorization was apparently enacted in an atmosphere of the appointment of individual special prosecutors with particularized experience for particular cases. But this should not be and has not been interpreted as a requirement to thwart the comprehensive sweep of the statutory language, which was to facilitate the government's prosecutorial efforts when unleashed by the Attorney General to deal with rackets and organized crime through an elite corps of the government's prosecutors.

The issue raised here, in the context of a different atmosphere was apparently first considered in the District in 1922, when Judge Augustus Hand decided *U.S.A. v. Morse*, 292 F. 273 (S.D.N.Y. 1922). There also a defendant had challenged the authority of a specially appointed prosecutor to appear before the Grand Jury which had indicted him. The appointment was a limited one—pertaining only to a particular situation—not as

here for "any kind" of situation. One of the issues with which the Court in *Morse* was faced was "whether the designation as counsel which [the special prosecutor] received from the Attorney General was sufficiently specific". At 275. The prosecutor in that case had two commission letters, one of which mentioned three criminal statutes and stated the objects of the prosecution to be defendants related to specific corporations. The Court found the authorization to be sufficiently specific, noting that more specificity might deny the prosecutor "adequate power to deal with the situation without impairment of usefulness or unnecessary reduplication of labor." (At 276).

It is on exactly this point that this Court must disagree with the well-researched opinion of Judge Werker. The authorization here to the members of the Special Strike Force was without limitation—it was to prosecute "any kind of legal proceedings including Grand Jury proceedings". The commission was to meet the needs of modern law enforcement, to give the Strike Force prosecutor "adequate power to deal with the situation [any situation] without impairment of usefulness or unnecessary reduplication of labor.

Section 515(a) of Title 28 U.S.C. may properly be read not as a Limitation but as a broad grant authorizing commissions as general as those in the letters questioned here *Compare Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941); *In Re Persico*, 75 Civ. 96 (E.D.N.Y. Feb. 5, 1975); *United States v. Sheffield Farms Co.*, 43 F. Supp. 1 (S.D.N.Y. 1942).

The concerns expressed in *Crispino* on the subject of overly broad commissions do not seem to apply to Strike Force situations. The appointment of Strike Force attorneys was not intended to create a competition as between the regular local prosecutors and the members of the nationally organized strike force teams. Each serve a separate need and purpose. One does not supersede the other—they complement each other's function. The situations dealt with by the Strike Force cannot be equated with routine and local situations normally prosecuted in

particular Districts nor to authorizations that might fall into legally insufficient competence.

Since the statute does not confine its application to particular facts or particular defendants, it would appear appropriate for the Courts to implement the public policies to be served through Strike Forces by upholding a broad grant of authority and to sustain a commission that directs members of the specially selected Strike Force to prosecute any kind of legal proceeding. Indeed to hold that such commissions are insufficiently specific would not serve any public purpose but might have mischievous and drastic effects as a precedent against the current needs of law enforcement across the country. No fundamental rights are at stake here that need be conserved in the constitutional interests of criminal targets. There is a strong public interest in implementing the broad purposes of the Congress and the executive by upholding the authority of the special prosecutors of the Strike Force.

This is not a case like *United States v. Giordano*, 416 U.S. 505 (1974), where the Justice Department had attempted to utilize improperly its authority to proceed with wire-tap surveillance—an intrusion on the right of privacy constitutionally safeguarded. The failure of the only accredited public official to personally assume responsibility and to properly authorize the wiretaps in *Giordano* was in disregard of clearly defined statutory mandates and frustrated a congressional policy legislated for the benefit of individuals.

In this case the congressional purpose was not to limit or hobble the pursuit of organized crime—rather the Congress and the executive intended to expand existing prosecutorial facilities and weapons. The specific authorization and direction intended was not by way of a limitation of, but an extension of the government's ability to prosecute "any kind" of crime in "any kind" of legal proceeding.

As the Court stated in *Haberman v. Finch*, 418 F.2d 664, 666 (2d Cir. 1969):

> It is a familiar maxim of statutory interpretation that Courts should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation.

Here the overriding purpose of 28 U.S.C. §515(a) is to benefit and protect the public by expanding the prosecutorial capacity of the federal government, and that purpose would clearly not be served by an interpretation that would place unnecessary black-letter limitations on the attorneys of the "strike forces" in their prosecution of organized crime.

With respect, therefore, I cannot follow the path of my brother Werker on this issue. Defendants' motions to dismiss the indictment because a Strike Force representative proceeded against them before the Grand Jury are denied.

SO ORDERED.

February 24, 1975

Milton Pollack
U.S. District Judge

28 USCA Sec. 515

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.00.

ORDER OF AFFIRMANCE

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of September, one thousand nine hundred and seventy-five.

Present:

HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges,

(SAME TITLE)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-501

JAMES BROWN A/K/A JAMES FEDERICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction should be set aside and his indictment dismissed despite his plea of guilty, because the Criminal Division attorney who conducted the grand jury proceedings that resulted in the indictment was not properly authorized to conduct the grand jury inquiry.

Following a plea of guilty to one count of a ten-count indictment, petitioner was convicted of conspiracy to pass, possess, and deal in counterfeit United States obligations, in violation of 18 U.S.C. 371. He was sentenced to three years' imprisonment and was fined $2,500. The other counts were dismissed with the consent of the government. The court of appeals affirmed without opinion (Pet. 15).

The attorney who presented the case to the grand jury was Edward J. Levitt, a Criminal Division attorney assigned to the Field Office of the Organized Crime and Racketeering Section in the Southern District of New York.

Before conducting the grand jury inquiry, as *indicia* of his authority to represent the United States in the Southern District of New York, he filed a letter of authorization along with a copy of a duly executed oath of office with the clerk of the district court. The letter was similiar to the letters filed by the Criminal Division attorneys in *United States* v. *Wrigley*, 520 F.2d 362 (C.A. 8), certiorari denied, November 17, 1975, No. 75-5284. It specifically "authorized and directed" him to conduct in the Southern District of New York "any kind of legal proceedings, civil or criminal, including Grand Jury proceedings * * *, which United States Attorneys are authorized to conduct" (Pet. 7).

Prior to pleading guilty, petitioner moved to dismiss the indictment on the ground that prosecutor Levitt was not properly authorized to appear before the grand jury. The district court denied the motion in a memorandum opinion (Pet. 6-13; 389 F. Supp 959), and the court of appeals affirmed.

Petitioner's contention is foreclosed by his guilty plea, since a "plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects" (*United States* v. *Spada*, 331 F.2d 995, 996 (C.A. 2), certiorari denied, 379 U.S. 865). See also *Coleman* v. *Burnett*, 477 F.2d 1187, 1193-1195 (C.A. D.C.). The presence of unauthorized persons in the grand jury room, like other irregularities in the grand jury proceedings, is a waivable defect. See *Davis* v. *United States*, 411 U.S. 233, 236-237. See also the Advisory Committee's Notes to Rule 12(b)(2), Fed.R.Crim. P. Indeed, as this Court stated in *Tollett* v. *Henderson*, 411 U.S. 258, 267:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the

guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [v. *Richardson*, 397 U.S. 759].[1]

In any event, as we argued in our memorandum in opposition in *Wrigley*, *supra*, the claim that the Criminal Division attorney was not properly authorized to conduct the grand jury proceeding is without merit.[2] See *United States* v. *Wrigley*, 520 F.2d 362 (C.A. 8); *In re Subpoena of Persico*, 522 F.2d 41 (C.A. 2); *In re DiBella*, 518 F.2d 955, 958 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[1]There is no exception here like the state rule in *Lefkowitz* v. *Newsome*, 420 U.S. 283, 288-292, which permits an appeal despite a guilty plea. Nor is there any claim here, like the one in *Menna* v. *New York*, No. 75-5401, decided November 17, 1975, "that judged on its face—the charge is one which the [government] may not constitutionally prosecute" (slip op. 2, n. 2).

[2]We have sent a copy of our memorandum in opposition to counsel for petitioner.